

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CATHERINE GRAMMES
Petitioner

CIVIL ACTION

v.

DOUGLAS P. GRAMMES,
Respondent

NO. 02-7664

MEMORANDUM AND ORDER

McLaughlin, J.

January 29, 2003

The petitioner, Catherine Grammes, has filed a petition for the return of the parties' son, Samuel Grammes, pursuant to 42 U.S.C. § 11603 and the Hague Convention on the Civil Aspects of International Child Abduction, October 28, 1980, 1343 U.N.T.S. 89 ("The Hague Convention"). The respondent, Douglas Grammes, has filed a motion to dismiss the petition, alleging that the Court should abstain from hearing the case because of the pendency of Pennsylvania child custody proceedings. The Court will deny the motion to dismiss.

I. Background

A. Custody Litigation in Canada and Pennsylvania

The parties separated in December 1999, and the petitioner and the parties' son, Samuel, moved to Ontario, Canada. The parties shared custody pursuant to a private

agreement until June 26, 2000. On that date, the respondent initiated a custody action in the Court of Common Pleas of Monroe County, Pennsylvania. On July 10, 2000, the parties signed a custody stipulation that was approved and entered as an order by the Monroe County court. In August of 2000, the Monroe County court adopted the recommendations of a custody conciliator who recommended shared custody based on the stipulation.

Respondent's Addition to Motion to Dismiss, (hereinafter "Res. Add. Ex.") Ex. N; Respondent's Motion to Dismiss, (hereinafter "Res. Ex.") Ex. A.

On September 15, 2000, the petitioner filed a custody complaint in Ontario, Canada. Ten days later she filed a petition to modify custody in Monroe County. Res. Add. Ex. N.

On October 4, 2000, the respondent filed an emergency petition in Monroe County, requesting that the court modify custody and hold the petitioner in contempt. On October 19, the respondent filed a petition in Ontario to return the child to Pennsylvania under the Hague Convention on Child Abduction ("Hague petition"). Id.

On October 24, 2000, the Monroe County court granted the respondent interim sole legal and physical custody. In January of 2001, the Ontario COURT **denied** the respondent's Hague petition. Res. Add. Ex. N.

On February 2001, the respondent **filed** for custody in the Ontario court. On March 26, 2001, the Ontario court awarded interim custody to the petitioner, and gave the respondent the right **to** physical custody one week and one weekend per month. The Ontario court also ordered that the child could not leave Canada until a mirror order was entered in Pennsylvania. On July 31, 2001, pursuant to a stipulation by the parties, a mirror order was entered in the Monroe County court. Two months later, in September **of 2001**, the Ontario court held the petitioner in contempt **of** its March 2001 order. Petitioner's Exhibit, (hereinafter "Pet. **Ex.**") A.

In January of 2002, while Samuel was visiting him in Pennsylvania, the respondent filed an emergency petition in the Monroe County court for a modification of custody and for an order of contempt against the petitioner. Pursuant to the respondent's *ex parte* request, the Monroe County court granted sole legal and physical custody to the respondent pending a hearing; thereafter, Samuel was not returned to Canada. On February **14** and **21**, 2002, over an objection by the petitioner to the court's exercise of jurisdiction, the Monroe County court heard testimony from both parties on these issues. Res. Ex. C; Res. Add. Ex. **N**.

On February 22, 2002, the Ontario court found that

jurisdiction lay in Ontario, held the respondent in contempt, and ordered that the respondent return the child to the petitioner in Canada. The Ontario court then adjourned its proceedings until March 22, 2002. Pet. Ex. B.

In an Order dated March 18, 2002, the Monroe County court held that it had jurisdiction over the child custody case and, without comment, denied the petitioner's motion to dismiss **for lack of jurisdiction.** Res. Ex. E.

On March 19, 2002, the Monroe County court issued an order and opinion that: 1) found the petitioner in contempt of a prior Monroe County court order; 2) granted the parties shared legal custody; 3) granted the parties shared physical custody until the child reaches the age for mandatory schooling in Canada; 3) ordered that, once the child reached school age, the petitioner is to have primary physical custody and the respondent partial custody; 4) ordered that the petitioner could not relocate more than fifteen miles from her home without permission; 5) ordered that the parties could not use or permit the use of drugs when they had physical custody and ordered the parties to undergo anger management; 6) ordered the petitioner to post a \$100,000.00 bond prior to exercising her right to physical custody; 7) ordered the respondent to post a bond; 7) ordered that the parents share transportation equally; and 8) ordered

that a mirror order be filed in the Ontario court prior to the petitioner's exercise of physical custody. Res. Ex. F, G.

The parties cross-appealed this order to the Superior Court of Pennsylvania. On December 3, 2002, the Superior Court issued an opinion. The opinion affirmed the March 18 order in full, and affirmed **all** aspects of the March 19 except for the bond requirements. The matter was remanded to the Court of Common pleas for re-determination on the issues relating to the bonds. A petition for allocatur has been made to the Supreme Court of Pennsylvania. Res. App. Ex. N.; Transcript of January 13, 2003 Hearing, at 3.

B. The Hague Petition Before This Court

The petitioner has filed a Hague petition in this Court for the return of the parties' child to Canada. A petition under the Hague convention requires that the Court determine whether the child has been "wrongfully removed or retained" within the meaning of the convention. 42 U.S.C. § 11603(e) (1)(A). Removal is wrongful under the convention if:

- a) it is in breach of the rights of custody attributed to a person ... under the law of the State in which the child was habitually resident immediately before the removal or retention;
- b) at the time of the removal or retention those rights were actually exercised ... or would have been so

exercised but for the removal or the retention.

Hague Convention on the Civil Aspects of International Child Abduction, October 28, 1980, ch. I, art. 3., 1343 U.N.T.S. 89.

To resolve the petitioner's Hague petition, the Court must decide: whether the respondent removed the child from Canada; whether Canada was the child's habitual residence immediately prior to the removal; whether the removal violated the petitioner's rights of custody under Canadian law; and whether the petitioner was exercising, **or** would have exercised, those custodial rights.

The respondent filed a motion to dismiss the Hague petition, arguing that this Court should abstain from hearing the petition under the Rooker-Feldman, Younger, and Colorado River abstention doctrines. The Court finds that abstention is not appropriate and will deny the motion to dismiss.

II. Analysis

A. Rooker-Feldman

The Rooker-Feldman doctrine is an abstention doctrine derived from the general principle that the Supreme Court **of** the United States, and not lower courts, has jurisdiction to review state court decisions. Parkview Assoc. Partnership, et al. v. City of Lebanon, et al., 225 F.3d 321 (3d Cir. 2000). Under

Rooker-Feldman, federal courts lack subject matter jurisdiction in two types of cases - 1) cases in which the federal court is asked **to** review final adjudications of a state's highest court', and 2) cases in which the federal court is asked to evaluate claims that are "inextricably intertwined" with a state court's decision. FOCUS v. Allegheny County Court of Common Pleas, 75 F.3d 834, 840 (3d Cir. 1996).

This case does not fall into the first category of cases where Rooker-Feldman abstention is required. The Court is **being asked to consider** a Hague petition, an issue that was not raised or litigated in the state court; this case is not a direct 'appeal" from **the** state court's judgment.

Nor are the claims inextricably intertwined. The federal Hague petition claim and the state law child custody action present separate and distinct factual and legal issues. The Pennsylvania state court proceedings concerned a custody determination based on what would be in the best interest of the child. The federal court is not required to address, in any way, the merits of the custody action.

In the Hague petition matter, the sole question that

¹The Third Circuit has stated that the doctrine also bars review **of** final decisions **of** lower state courts. Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey Police Dept., 973 F.2d 169, 177-78 (3d Cir. 1992).

the Court must determine is whether the child at issue was "wrongfully removed" under the Hague Convention. The Hague petition issue was never raised in the state court; none of the issues underlying a Hague petition have been decided by or addressed by the state court. \"Wrongful removal" and "habitual residence" are terms with special meaning under the Hague convention, distinct from the custody and jurisdictional issues addressed in state law custody claims. E.g., Holder v. Holder, 305 F.3d 854 (9th Cir. 2002).

Because of this distinction, this Court is not required to second-guess or reverse the state court in order to ensure compliance with the Hague treaty. Because federal and state cases are not inextricably intertwined, abstention is not required by Rooker-Feldman. See also Mozes v. Mozes, 239 F.3d 1067 (9th Cir. 2001) (stating in dicta that the existence of a final state custody order would not require a federal district court to abstain from hearing a Hague petition case).

B. Younger

The Younger abstention is a prudential doctrine based on notions of comity between federal and state courts. It is based on "our federalism," the belief that the government will fare best if the states are left alone in performing their

separate functions in their separate ways. Younser v. Harris, 401 U.S. 37, 41 (1971). See also Anthony, et al. v. Gerald Council, Hon., et al., No. 01-2735, 2003 U.S. Dist. LEXIS 936 (3d Cir. 2003).

The Third Circuit has held that, even if Younser abstention would be otherwise appropriate in a case, a court should not abstain if there are extraordinary circumstances exist wherein deference to the state court proceeding will present a significant and immediate potential for harm to a federal interest. Shall v. Joyce, 885 F.2d 101, 106 (3d Cir. 1989). In this case, the circumstances surrounding a Hague petition require that the federal court not abstain.

The purpose of the Hague convention is to ensure that the rights of custody and access under the law of one nation are respected by the other nations. Hague Convention on the Civil Aspects of International Child Abduction, October 28, 1980, ch. I, art. 1(b), 1343 U.N.T.S. 89. In Grieve v. Tamerin, 269 F.3d 149 (2d Cir. 2001), the court reasoned that federal courts should not abstain under Younger because a Hague petition claim implicates a "paramount federal interest in foreign relations and the enforcement of United States treaty obligations." Id. at 153.

The Grieve court also noted that "deference to a state

court's interest in the outcome of a child custody dispute would be particularly problematic in the context of a Hague Convention claim" because the Convention divests the state of jurisdiction over these custody issues until the merits of the Hague convention claim have been resolved. Id.

This Court concurs with the reasoning in Grieve that the type **of comity** concerns that underlie Younser abstention do not exist in a Hague petition case. Id. Failing to hear the Hague petition case would be contrary to the language and purpose of the treaty and would jeopardize the federal interest in ensuring enforcement **of** treaty obligations.

The language of the treaty indicates that it was contemplated that the treaty would supersede local custody orders. **As** the State Department Legal Analysis explains, "Children ... are not automatically removed from [the Convention's] protections by virtue of a judicial decision awarding custody **to** the wrongdoer." Hague International Child Abduction: Text and Legal Analysis, 51 Fed. Reg. 10504 (March 26, 1986). Article 17 of the treaty states "the sole fact that a decision relating to custody has been given or is entitled to recognition ... shall not be a ground for refusing to return a child under this Convention." Hague Convention on the Civil Aspects of International Child Abduction, October 28, 1980, ch.

I, art. 17., 1343 U.N.T.S. 89.

The State Department analysis explains that an abductor cannot insulate the child from return under the convention by "merely obtaining a custody order in the country of new residence." 51 Fed. Reg. 10504. Federal abstention based on such a custody order would reduce the ability **of** an aggrieved parent to obtain relief under the treaty. See also Silverman v. Silverman, 267 F.3d 788 (8th Cir. 2001) (holding that Younger abstention principles do not apply in a Hague petition case because there is no discretion as to relief and therefore the relief sought is not equitable).

C. Colorado River

The pendency **of** state court proceedings does not generally bar a federal court from hearing a case; abstention is the exception, not the rule. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976). Under Colorado River, the threshold question is whether the state and federal cases are sufficiently similar or parallel to be duplicative. 424 U.S. at 819.

Because the cases at issue here are not duplicative, the Court need not abstain. The federal Hague petition and the **state** custody action address distinct and separate issues. In

Holder v. Holder, 305 F.3d 854 (9th Cir. 2002), the Ninth Circuit held that a district court erred in abstaining under Colorado River in a Hague Petition case. Id. at 863. The court held that the two cases were not substantially similar and thus the proceedings were not parallel. Id.

This reasoning is applicable in this case. Although both the state case and the Hague petition case involve a **child** custody issue, the issues to **be** considered and the decisions to be made in each case are different. The terms "habitual residence" and "wrongful removal," which form the core of the Hague petition analysis, have their own meanings under the Hague Convention and are distinct concepts from local child custody law. See id. None of the Hague petition issues have been raised or litigated in state court; nor will any of the child custody issues be litigated in federal court. The two cases are not duplicative.

An appropriate order follows.

